No. 21749

IN THE

United States Court of Appeals For the Ninth Circuit

SHIBO HAYASHI, an individual; and SHIBO HAYASHI, SHIZUYE OKIMOTO and FUGIO OKIMOTO, individuals d/b/a GREAT NORTHERN PEAT COMPANY,
Appellants,
v.
RED WING PEAT CORPORATION,
a Texas Corporation,
Appellee,
and
SUNSHINE GARDEN PRODUCTS, INC., a California Corporation; WILSON & MEYER & Co., a Nevada Corporation; WESTERN PEAT COMPANY, LTD., a Canadian Corporation; LULU ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corporation; MEADOWLAND FARMS, LTD., a Canadian Corporation; WESTERN PEAT MOSS, LTD., a Canadian Corporation; NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and RICHMOND PEAT MOSS, LTD., a Canadian Corporation,
Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

BRIEF OF APPELLEE

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG
ROBERT W. GRAHAM
RONALD T. SCHAPS
PETER D. BYRNES
Attorneys for Appellee

Office and Post Office Address:
14th Floor, Norton Building
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

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SUNSHINE GARDEN PRODUCTS, INC., a California Corporation; WILSON & MEYER & CO., a Nevada Corporation; WESTERN PEAT COMPANY, LTD., a Canadian Corporation; LULU ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corporation; MEADOWLAND FARMS, LTD., a Canadian Corporation; WESTERN PEAT MOSS, LTD., a Canadian Corporation; NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and RICHMOND PEAT MOSS, LTD., a Canadian Corporation,
Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

BRIEF OF APPELLEE

COUNTERSTATEMENT OF THE CASE

The trial court dismissed Red Wing Peat Corporation (hereinafter called "Red Wing") upon a finding that venue as to this defendant was improperly laid in the Western District of Washington (Document 67). The issue raised by appellants is whether Red Wing, which

admittedly does not transact any business in the State of Washington, may be sued there solely on the basis that a subsidiary corporation transacts business within the state and there is a common officer between the parent and subsidiary corporations.

The essential allegations of the appellants' Second Amended Complaint may be summarized as follows: (1) eight defendant peat producers located in British Columbia, Canada are alleged to be the dominant processors of peat in that province; (2) allegations are made concerning their methods of selling peat in Canada, and its eventual distribution and sale in the western states of the United States—and particularly the State of Washington —during the period from 1953 to 1965, which methods are asserted to be in violation of the anti-trust laws of this country; and (3) plaintiffs allege injury to their peat business in the State of Washington (Document 11).

Defendant Western Peat Moss Ltd. (referred to as "New Western")—a Canadian corporation and a subsidiary of Red Wing (Document 57, p. 4)—is made a defendant on the basis of allegations concerning its status as a British Columbia peat producer, allegations concerning purchases from other defendant British Columbia peat producers, and allegations concerning its sale of peat in the State of Washington (Documents 11, 44). New Western is before the court as a defendant, along with the seven other Canadian peat producers.

Red Wing—the party dismissed—was not a party in the original complaint but was added as a party defendant on the basis of allegations concerning its ownership of

the stock of New Western since 1963 (Document 11, p. 9).

It is uncontroverted that Red Wing: (1) is a Texas corporation; (2) has as its only places of business, its headquarters in Sylvania, Ohio and its peat production facilities in Cromwell, Minnesota; (3) has never produced, sold, purchased, or contracted to purchase or sell any peat, peat moss or related or unrelated products of any kind in the State of Washington; (4) has never shipped or caused to be shipped any product into or from the State of Washington; (5) has never been licensed, authorized or qualified to carry on business within the State of Washington; (6) has never had any statutory agent of any kind or character within the State of Washington; (7) has never owned or leased any property, real or personal, within the State of Washington or received income from any source within said state; (8) has never maintained any office or place of business of any kind, telephone listing or mailing address within the State of Washington; (9) has no director, officer, shareholder, employee or agent that resides or works in the State of Washington; and (10) has never had any officer, director, shareholder, employee or agent present in the State of Washington for the purpose of transacting any business of any kind for or on behalf of Red Wing (Document 57, pp. 1-4). It is also undisputed that none of the other defendants own any stock or other financial interest in Red Wing (Document 57, p. 4).

Conversely, there has been no allegation, whether by complaint or affidavit, that Red Wing is in any way (1) a producer of peat in British Columbia, (2) itself participating in any of the alleged peat purchase and sale trans-

actions or other arrangements complained of, or (3) integrating its corporate activities with the alleged transactions complained of. Indeed, the appellants' detailed allegations concerning the transactions complained of negate any participation by Red Wing (Documents 11, 44; App. Brief, pp. 2-5).

There are two facts upon which appellants seek to lay venue against Red Wing in the Western District of Washington:

(1) New Western is a subsidiary of Red Wing; and

(2) Mr. John Dunfield is president of both Red Wing and New Western, and Mr. John Fleming, who is alleged to have participated in certain transactions on behalf of New Western, is also one of the Assistant Secretary-Treasurers of Red Wing. (Memorandum Opinion, Document 72, p. 3; App. Brief, p. 16; Document 57, p. 2; Document 61.)[1]

ARGUMENT

The only issue before this court is whether or not venue may be properly laid against Red Wing in the Western District of Washington. The validity of the service of process upon Red Wing[2] in Ohio (Document 26) is in issue only upon the basis that Congress has made the laying of proper venue a *prerequisite* to the validity of

1. Appellants' assertion (App. Brief, pp. 5-6) that Mr. Fleming appeared before the United States Tariff Commission on behalf of both Red Wing and New Western not only adds nothing to these factors, but is totally inaccurate and refuted by their attachment to their own affidavit (attachment, Document 61).

2. The motions of Lulu Island Peat Company, Ltd., Coast Peat Company, Ltd., and Blundell Peat Company, Ltd., which are not presently before this court do involve an additional issue of the validity of extra-territorial service where it is made in a foreign country (Document 35).

such extra-territorial service. *Goldlawr, Inc. v. Heiman,* 288 F.2d 579 (2d Cir., 1961).

A. Burden of Proof

It is clear that after challenge, as here, the burden of proving proper venue rests upon the plaintiff. *Bruner v. Republic Acceptance Corp.,* 191 F. Supp. 200 (D.C. Ark., 1961); *Wentling v. Popular Science Publishing Co.,* 176 F. Supp. 652 (D.C. Pa., 1959).

B. The Standards for Determining Venue and Their Application to Red Wing

While Congress liberalized the venue provisions for private anti-trust treble damage actions (15 U.S.C.A. §§ 15, 22) it was unwilling to give private plaintiffs an unlimited choice of forums. *United States v. National City Lines, Inc.,* 334 U.S. 573, 92 L.Ed. 1584 (1948). Congress also withheld from private plaintiffs the broad power to join defendants without regard to venue, which power *was granted* to the federal government in certain proceedings (15 U.S.C.A. § 25).[3] Thus, the United

3. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof." 15 U.S.C.A. §25.

States Supreme Court has readily recognized that a plaintiff in a private treble damage action must prove proper venue as to each defendant within the express terms of the antitrust venue provisions.

> "Congress therefore was not indifferent to possibilities of abuse involved in the various proposals for change. Exactly the opposite was true. For the broader proposals were not rejected because they gave the plaintiff the choice. They were rejected because the choice given was too wide, giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. *In adopting* § 12 *Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice.* 51 Cong. Rec. 9466, 9467. But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in the districts where by a course of conduct they had violated the Act with the resulting outlawed consequences. In framing § 12 to include those districts at the plaintiffs' election, Congress thus had in mind not only their convenience but also the defendant company's inconvenience, and fixed the limits within which each could claim advantage in venue and beyond which neither could seek it. . . ." *United States v. National City Lines, Inc.*, 334 U.S. 573 at 587-588, 92 L.Ed. 1584 at 1593 (1948). (Emphasis supplied)
>
> ". . . Congress by 15 U.S.C. § 15 placed definite limits on venue in treble damage actions." *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379 at 384, 98 L.Ed. 106 at 112 (1953).

Section 4 of the Clayton Act (15 U.S.C.A. § 15)[4] pro-

4. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C.A. §15.

vides that venue in a suit against an individual may be laid in any district where the defendant:

(a) resides;

(b) is found; or

(c) has an agent.

Section 12 of the Clayton Act (15 U.S.C.A. § 22)[5] provides that venue in a suit against a corporation may be laid in any district where the corporation:

(a) has its place of inhabitancy;

(b) is found; or

(c) "transacts business."

It is clear from the affidavit of Mr. Trott (Document 57), and undisputed by appellants, that Red Wing is not an inhabitant of nor does it reside in the Western District of the State of Washington.

It is equally clear from Mr. Trott's affidavit (Document 57) that Red Wing itself is not found in, has no agent in, and transacts no business within the Western District of the State of Washington. Appellants do not dispute this, but contend that Red Wing is transacting business[6]

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5. "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 15 U.S.C.A. §22.

6. The concept of transacting business is more encompassing than that of being "found" and under the circumstances of this case it is obvious that Red Wing could not be "found" within the district if it is not transacting business therein. 1 Moore, *Fed. Prac.*, par. 0.144 [15] at 1668 (2d ed. 1964); *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677 (D.C. Pa., 1958).

within the district by virtue of its parent-subsidiary relationship with New Western which is doing so, and by virtue of the so-called "co-conspirator theory."

1. *Red Wing Is Not Transacting Business Within the District By Virtue of Its Parent-Subsidiary Relationship With New Western.*

The decisions uniformly establish that the words "transacts business" in Section 12 of the Clayton Act contemplate and require that a defendant be carrying on business of a substantial and continuing character in the particular judicial district where venue is attempted to be laid. This was firmly established by the United States Supreme Court in *United States v. Scophony Corp. of America*, 333 U.S. 795, 92 L.Ed. 1091 (1948), wherein the court stated:

> "This construction gave the words 'transacts business' a much broader meaning for establishing venue than the concept of 'carrying on business' denoted by 'found' under the pre-existing statute and decisions. The scope of the addition was indicated by the statement 'that a corporation is engaged in transacting business in a district . . . if *in fact, in the ordinary and usual sense*, it "transacts business" therein *of any substantial character.*' Id. 273 U.S. at 373, 71 L.Ed. 689, 47 S. Ct. 400.
>
> "In other words, for venue purposes, the court sloughed off the highly technical distinctions theretofore glossed upon 'found' for filling that term with particularized meaning, or emptying it, under the translation of 'carrying on business.' In their stead it substituted the practical and broader business conception of engaging in any substantial business operations. . . . The practical every day business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." 333 U.S. at 807, 92 L.Ed. at 1100.

See also, for example, *Bruner v. Republic Acceptance Corp.*, 191 F. Supp. 200 (D.C. Ark. 1961), wherein the court stated at page 203:

> "But, although the statute is to be given a liberal construction, it does not go so far as to permit venue to be predicated upon any corporate contacts with the foreign district, regardless of how slight, minimal, or sporadic those contacts may be. *The business transacted must be of substantial character, and it must have some degree of continuity.* Mere isolated or sporadic contacts are not sufficient . . . And, when venue is challenged by a defendant, the burden of proof is upon the plaintiff." (Emphasis added)

It has also been long established that a parent-wholly owned subsidiary relationship, even with common officers, does not establish that the parent corporation is transacting business in a state merely because the subsidiary is doing so. The parent corporation will be held to be transacting business in the state only when it is established that the separation of corporate activities between the parent and subsidiary was purely fictional. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 69 L.Ed. 634 (1925).

Terry Carpenter, Ltd. v. Ideal Cement, 117 F. Supp. 441 (D.C. Neb. 1954), contains an excellent discussion of the authorities on this issue. In that case the plaintiff sought to lay venue against a parent corporation by showing the parent-wholly owned subsidiary relationship, common officers and common interlocking directorates. Chief Judge Donohoe held that such a showing was insufficient to establish venue as to the parent corporation even though the subsidiary was transacting business with-

in the state. See also: *Lawlor v. National Screen Service Corporation,* 10 F.R.D. 123 (D.C. Pa. 1950); *Anderson v. British Overseas Airways Corp.,* 144 F. Supp. 543 (S.D., N.Y. 1956).

Appellants' brief does not challenge the validity and correctness of these decisions and the standards they establish. Indeed, appellants' brief presents no legal argument or authorities specifically in support of their attempt to establish venue on the basis of the parent-subsidiary relationship.

Intermountain Ford Tractor Sales Company v. Massey-Ferguson, Ltd., 210 F. Supp. 930 (D.C. Utah, 1962) aff'd *per curiam,* 325 F.2d 713 (10th Cir., 1963), relied upon by appellants before the trial court (Document 63), also recognized the full force of these standards and permitted venue to be laid against the parent corporation only upon the basis that the plaintiff had demonstrated that the separate identities of the corporations had been destroyed by superimposing on the corporations a separate controlling entity, which the court described as follows:

> ". . . This 'North American Operations' appears to be not merely a council of officers from the respective corporations, each acting in separate capacities and with respect only to the particular corporation which he represents, but essentially another entity in which separate corporate functions are merged in many respects, employing as such numerous assistants and employees and often acting directly with subsidiary corporate activities rather than through the top management of the respective corporations. . . . " 210 F. Supp. at 935.

The court, therefore, concluded:

> *"I am not unmindful that common officers and di-*

> *rectors ordinarily may not be regarded as demonstrating an unacceptable commingling of operations.* But here they do not function at separate times and under separate circumstances with regard to the respective businesses. On the contrary, by the device of the North American Operations, common officers of both meet together at a higher echelon to afford common direction to all North American Operations of the company, and to lay down detailed instructions concerning the operation of company stores. . . ." 210 F. Supp. at 937. (Emphasis supplied)

The only facts presented by the appellants to justify laying venue against Red Wing in the Western District of Washington are the parent-subsidiary relationship and the existence of a common officer. In February, 1964, appellants took the exhaustive statement of Mr. Bell, upon which they rely so heavily, and subsequently have filed an original and two amended complaints of detailed nature and at least two affidavits (Documents 44, 1, 3, 11, 61). Throughout these numerous documents covering a period of three years, Red Wing is either not mentioned at all or is referred to in factual allegations only with reference to the establishment and existence of its subsidiary and the existence of a common officer. There have been no factual allegations that Red Wing is a British Columbia peat producer, is itself participating in any of the alleged transactions complained of, has itself performed any act or transacted any business within the district, or that the separate identities of the corporations and their operations have been merged. Indeed, the factual allegations the appellant have made negate any participation by Red Wing in the matters complained of.

Appellants also cite a number of cases where the decision on venue was stayed pending further discovery. It

should be recognized, of course, that in regard to these cases:

(1) It has been recognized that such action is a matter of discretion with the trial court.

> ". . . There being no statute or rule directing the procedure to be followed in determining whether the prerequisites to jurisdiction and venue exist, the manner in which such determination should be made is left to the discretion of the trial judge. *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725, 83 L.Ed. 1111 (1939); *Kantor v. Comet Press Books Corporation, D.C.*, 187 F. Supp. 321 (1960). . ." *Ziegler Chemical & Mineral Corp. v. Standard Oil Co. of Cal.*, 32 F.R.D. 241 at 243 (N.D. Cal. 1962).

(2) The trial courts have exercised their discretion in terms of specific factual allegations relating to venue, which indicated a probability that venue exists. See for example: *Ferraioli v. Cantor*, 259 F. Supp. 842 (S.D. N.Y., 1966). Compare the various treatments given the numerous motions to dismiss in *School District of Philadelphia v. Kurtz Bros.*, 240 F. Supp. 361 (E.D. Pa., 1965), where the motion to dismiss as to the defendant brought in on the basis of a parent-subsidiary relationship was granted without further opportunity for discovery.

(3) In temporarily delaying a venue determination, the courts have expressly limited the intervening discovery to matters relating to venue. In the present case, however, the appellants had previously disavowed any desire to have further discovery which is limited to venue matters Document 74, Reporter's Transcript, June 3, 1966, p. 50).

In view of (1) the clear and unequivocal statements in Mr. Trott's affidavit, (2) the absence of specific factual

allegations or statements concerning Red Wing, (3) the reasonable implications of the specific factual allegations made by the appellants and contained in their supporting statement from Mr. Bell, and (4) the attitude of appellants toward discovery limited to ascertaining venue, it certainly cannot be said that the trial court abused its discretion in determining the issue of venue. It must be remembered that the venue requirements are intended to be a *prerequisite* to a plaintiff's ability to bring a defendant before the forum—particularly by extra-territorial service.

2. *The "Co-Conspirator Theory" of Venue.*

While the appellants raised the issue of the so-called "co-conspirator theory" in response to motions to dismiss by other defendants who were alleged to be direct conspirators (Document 43), appellants did not argue this theory to the trial court in connection with Red Wing's motion to dismiss (Document 74, Reporter's Transcript, October 28, 1966, pp. 1-26; Documents 60, 63).

This is due to the fact that appellants' factual allegations only assert an alleged conspiracy between other defendants and New Western, Red Wing's subsidiary. Appellants sought venue over Red Wing on the basis of the parent-subsidiary relationship between Red Wing and New Western rather than on any allegation of corporate participation in a conspiracy by Red Wing—and it was on this parent-subsidiary relationship that Red Wing's motion to dismiss was resisted and argued (Documents 60, 63; Document 74, Reporter's Transcript, October 28, 1966, pp. 1-26). It is submitted, therefore, that appellants have

not adequately raised this issue below in connection with Red Wing's motion to dismiss, so as to be entitled to raise it now on appeal.

In the event that this court should determine that the appellants by some implication below preserved this issue so that it is now before this court, appellee challenges the validity of the so-called "co-conspirator theory" and its extension to a defendant that has been joined solely on the basis of its parent-subsidiary relationship with an alleged co-conspirator.

The background of the "co-conspirator theory" dates back to a *dictum* statement in *Guisti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (9th Cir. 1946).[7]

In the *Guisti* case, the plaintiff, who was engaged in the business of buying and selling fireworks in California, sued Triumph, a Delaware corporation engaged in the manufacture of fireworks, and a number of other fireworks manufacturers. It was alleged that Triumph and the others conspired to organize an association for the purpose of controlling the sale of fireworks. The association met in California and within six months apparently succeeded in blacklisting the plaintiff. Triumph *later* qualified to do business in California and, after having conducted routine business there for several years, with-

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7. Prior to this decision the theory had been rejected in *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784 (S.D. N.Y., 1936), and *Westor Theatres, Inc. v. Warner Bros. Pictures, Inc.*, 41 F. Supp. 757 (D.C. N.J., 1941).

The language of the opinion in the recent case of *American Concrete Agricultural Pipe Ass'n v. No-Joint Concrete Pipe Co.*, 331 F.2d 706 (9th Cir., 1964), suggests that this court has recognized the need for a reconsideration of its dictum comments in the *Guisti* case and the implication that have developed as a result of lower court interpretations of those comments.

drew from the state, and pursuant to the California statutes, filed a certificate of withdrawal from intra-state business which provided *inter alia,* that Triumph consented to service on the Secretary of State in any action upon any liability incurred in California prior to its withdrawal.

This court, dealing solely with the issue of the validity of the service on the Secretary of State under the California statute, upheld the service, reasoning that the activities of the co-conspirators in California amounted to intra-state business within the meaning of the statute, and that the California members of the conspiracy were agents of Triumph so that Triumph was in California acting through such agents just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers. *Although this court indicated without reservation that the venue question was not in issue but was moot since Triumph had waived venue by creating an agent* in the state to accept service of process, the court's comment that local members of a conspiracy are agents of non-resident members gave illegitimate birth to the co-conspirator theory of venue under the federal antitrust laws.

The co-conspirator venue concept came under sharp attack in *Banker's Life & Cas. Co. v. Holland,* 346 U.S. 379, 98 L.Ed. 106 (1953). While the actual holding in *Banker's* was restricted to a ruling that mandamus did not lie, the court discussed the question of whether venue as to a non-resident defendant was properly laid in Florida on the strength of an allegation of conspiracy between the non-resident and his co-conspirators who did reside

in Florida. In discussing this question, the majority noted:

> ". . . While a criminal action under the antitrust laws lies in any district where the conspiracy was formed or in part carried on or where an overt act was committed in furtherance thereof, Congress by 15 U.S.C. § 15 placed definite limits on venue in treble damage actions. Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants unless venue was waived. It must therefore have contemplated that proceedings might be severed and transferred or filed in separate districts originally. Thus, petitioner's theory has all the earmarks of a frivolous albeit ingenious attempt to expand the statute." 346 U.S. at 383, 98 L.Ed. at 112.

In a separate opinion, the other three justices similarly criticized the theory and stated:

> "The only basis, on the record before us, for the claim that § 4 subjected the Georgia commissioner to suit is a suggestion that since the complaint charges a conspiracy between him and co-conspirators who reside in the southern district of Florida, the latter thereby became his 'agents' within the meaning of § 4 of the Clayton Act. The court now characterizes this contention as 'frivolous.' . . .
>
> "If we now had to decide whether a co-conspirator as such is an 'agent' for purposes of venue under 15 U.S.C. § 15, it cannot be doubted that we would have to conclude that the district judge was right in finding that the Georgia commissioner could not be kept in the suit." 346 U.S. at 385-386, 98 L.Ed. at 113.

Following the *Banker's* decision, numerous courts have rejected a "co-conspirator theory" of venue:

> *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833 (2d Cir., 1957) cert. denied 356 U.S. 936 (1958);

Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (D.C. Pa., 1958) aff'd 276 F.2d 614 (3rd Cir., 1960);

Intermountain Ford Tractor Sales Co. v. Massey-Ferguson, Ltd., 210 F. Supp. 930 (D.C. Utah, 1962) aff'd *per curiam,* 325 F.2d 713 (10th Cir., 1963);

Independent Productions Corp. v. Loew's, Inc., 148 F. Supp. 460 (S.D. N.Y., 1957);

Commonwealth Edison Co. v. Fed. Pac. Elec. Co., 208 F. Supp. 936 (N.D. Ill., 1962);

Interamerican Refining Corp. v. Superior Oil Co., 224 F. Supp. 35 (S.D. N.Y., 1963);

Bruner v. Republic Acceptance Corp., 191 F. Supp., 200 (D.C. Ark., 1961);

McManus v. Capital Airlines, 166 F. Supp., 301 (E.D. N.Y., 1958);

Periodical Distributors, Inc. v. American News Co., C.C.H. Trade Reg. Serv. par. 70,011 (S.D. N.Y., 1961);

Ohio-Midland Light & Power Co. v. Ohio Brass Co., C.C.H. Trade Reg. Serv. par. 78, 773 (S.D. Ohio, 1962).

The small minority of District Courts that have given some credence to the "co-conspirator theory" since the decision in the *Banker's* case have been almost entirely within the Ninth Circuit. These courts have done this loyally, if very reluctantly, in the belief that it represents the law, or at least the wishes, of this court. *Haliewa Theatre Co. v. Forman,* 37 F.R.D. 62 (D.C. Haw., 1965). It is time that this court corrected this minority interpretation of the *Guisti* dictum and indicated its adherence to the statutory terms of the venue provisions and the unanimous view of the United States Supreme Court in the Banker's decision.

While there is no doubt that Congress liberalized the venue provisions of the antitrust laws in order to relieve injured parties from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence, Congress did not intend thereby to "give plaintiffs free reign to haul defendants hither and yon at their caprice." *United States v. National City Lines,* 334 U.S. 573, 92 L.Ed. 1584. This is apparent from the fact that Congress, while explicitly granting the power to the federal government to bring all conspirators into the same forum regardless of venue (15 U.S.C.A. § 25), withheld the same power from private plaintiffs. As the court indicated in *Hansen Packing Co. v. Armour & Co., Inc.,* 16 F. Supp. 784 at 787 (S.D. N.Y. 1936) "the failure of Congress to make similar provisions for civil suits by private litigants implies an intent to withhold the privilege."

To permit venue as to all defendants on the basis of an allegation of conspiracy, which is usually found in the typical antitrust complaint in any event, goes beyond the congressional purpose and grants to the private plaintiff virtually unlimited power to bring his action in the forum of his choice since a number of different forums are generally available for venue purposes for each of many defendants. This result not only ignores the fact that Congress withheld such power from private antitrust plaintiffs, but also ignores the fact that Congress established detailed venue provisions separately applicable to each defendant. By ignoring the individual applicability of these venue provisions, the chances of a given defendant successfully defeating venue in a conspiracy case are abol-

ished, since, if the question of venue as to a given defendant abides the final determination of the existence of a conspiracy, it will only be after a full trial on the merits that the question can be resolved. At that point, the question of venue is totally submerged in the final judgment on liability, and even if a particular defendant played no part whatsoever in the conspiracy alleged, he has been denied the protection of the venue provisions—protection that Congress intended that the defendant have as a safeguard against abuse and as a part of the balancing of conveniences between plaintiffs and defendants. This is even more obvious in the instant case where Red Wing is involved as a defendant solely on the basis of its parent-subsidiary relationship with an alleged conspirator.

It is submitted that until Congress revises the venue provisions of the antitrust laws, venue as to each and every defendant in an antitrust action must be separately established, for in no other way can the congressional dictates on venue be satisfied. The so-called "co-conspirator theory" of venue, which has been repudiated by the U.S. Supreme Court, the Second Circuit Court of Appeals and many other courts, must be rejected.

C. Service of Process

Service of process is not a real issue in this case. The issue is venue. If proper venue had been established there would be no dispute about service. Since proper venue has not been established, appellants have failed to establish a prerequisite to the validity of the service in another state. *Goldlawr, Inc. v. Heiman,* 288 F.2d 579 (2d Cir., 1961). Furthermore, if the plaintiffs have

not established venue under the "transacts business" provisions of 15 U.S.C.A. § 22, they certainly have not met the "transaction of any business" requirement of Section 4.28.185 of the Revised Code of Washington, which the Washington Supreme Court has interpreted to require:

> ". . . there are three basic factors which must coincide if jurisdiction is to be entertained. Such would appear to be: (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." *Tyee Constr. Co. v. Dulien Steel*, 62 Wn.2d 106 at 115-116, 381 P.2d 245 (1963).

CONCLUSION

The plaintiffs have failed to establish proper venue in the Western District of Washington as to Red Wing and the trial court properly, and without any abuse of its discretion, granted Red Wing's motion to dismiss. The trial court should be affirmed.

Respectfully submitted,

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG
ROBERT W. GRAHAM
RONALD T. SCHAPS
PETER D. BYRNES
Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. GRAHAM
Of Attorneys for Appellee